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Sir Peter Gross  
Chair of the Independent Human Rights Act Review

By email to: [IHRAR@justice.gov.uk](mailto:IHRAR@justice.gov.uk)  
3rd March 2021

Dear Sir Peter,

**Response from Which? to the Independent Human Rights Act Review (IHRAR)'s call for evidence regarding the operation of the Human Rights Act 1998 (HRA).**

**Introduction**

Which? welcomes this opportunity to submit its views for the purposes of the IHRAR which is considering how the HRA framework is currently interpreted and applied with a view to establishing whether reform is needed.

By way of background, the Which? group is an independent, not-for-profit consumer organisation with over 1.3 million members and supporters in the UK. The group comprises the Consumers' Association, a registered charity, and Which? Limited, which is the commercial arm of the organisation under which we carry out our commercial activities that generate revenues that ultimately support the work of the charity. Since we were founded in 1957, Which? has been championing the cause for consumers by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer. We support consumers through our policy and campaigning efforts, and where necessary, through legal action. Our charitable arm, the Consumers' Association, was granted statutory powers pursuant to the Enterprise Act (parts 8 and 11), making us the only private enforcer of consumer law in the UK, and a designated consumer body, allowing us to make super-complaints.

The European Convention on Human Rights and Fundamental Freedoms (the 'Convention Rights') combined with the HRA provide crucial protections for individuals' fundamental rights, and Which? considers many of these to be relevant and useful in a consumer context.

In particular, Protocol 1, Article 1; the right to "peaceful enjoyment of one's property", not only protects individuals' personal possessions such as land, houses, and other property, but also their money. This protection is vital for consumers and supports Which?'s commitments to protecting peoples' financial rights and keeping them safe from scams. These issues are arguably even more crucial in the context of the global pandemic. Additionally, our focus on safeguarding consumers digital lives, and the protection of digital users is supported by the Article 8 fundamental right to privacy, which applies equally to individuals' activities both online and offline. These rights are also critically important in the present context given the extent of individuals' reliance on technology to perform many of their day-to-day tasks, like buying food and other essential items. Article 8 supports individuals' right not to be



disconnected from, priced-out of, or discriminated against when obtaining access to the internet. Such provisions are a useful tool in Which?'s fight against the problem of digital exclusion.

Other Articles in our view that offer important protections include Article 10, the right to freedom of expression, which we rely on in our role investigating and reporting matters of concern for consumers, which is important not only in order to hold business to account and raise awareness of issues, but also, more broadly, as method of initiating positive change for consumers. Article 6, in protecting civil rights and obligations is also very relevant to Which?'s priorities on better consumer enforcement.

But Which? does not only recognise the value of the HRA as a tool for individuals to utilise where they believe their fundamental rights have been violated, we also understand how it serves as a powerful practical tool for planning, delivering and securing rights-respecting services from public authorities, and supports calls (from organisations such as Which?) to change policy and legislation that may not be compatible with individuals' rights.

It is Which?'s view that individuals' rights have been strengthened by the introduction of the HRA, as prior to its introduction, it was both extremely costly and time-consuming for individuals to take action against public authorities where they believed their rights had been violated. UK citizens and/or residents were required to take their claim to the European Court of Human Rights in Strasbourg ('ECtHR'). The introduction of the HRA brought these fundamental rights home, allowing citizens and residents of the UK to seek redress directly for the first time in the UK courts. As we shall detail in our answers below, it is our belief that the HRA has been extremely effective at protecting individuals' Convention rights in the UK, and that case law has demonstrated how the current framework within which it operates is in fact working well.

In light of the above, Which? is keen to ensure that there are no adverse consequences brought about by the IHRAR. In particular, if there are to be changes, they should seek to strengthen individuals' rights and their ability to enforce them – for example, through improvements relating to the accessibility and speed of redress – and not result in the watering down or erosion of existing protections currently provided for by the operation of the HRA, nor place restrictions on the ability of individuals and organisations (such as Which?) to challenge UK legislation that may be incompatible with fundamental rights.

## **Which?'s response to the IHRAR's questionnaire**

### Theme one

**The relationship between the UK domestic courts and the European Court of Human Rights (ECtHR), including how the duty to "take into account" ECtHR jurisprudence has developed.**

#### **1. (a) - How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of Section 2?**

1.1 In Which?'s view, the duty of the UK court to take into account Strasbourg jurisprudence by virtue of Section 2 of the HRA has operated in practice exactly as the words describe. In fact, there are now

many examples of domestic courts deviating on reasoned grounds from the ‘mirror principle’ as described by the House of Lords in the *Ullah* case. For example, the Supreme Court decision in *Hallam* proved that the UK courts do not simply ‘slavishly follow’ ECtHR jurisprudence, and will depart from it where judges are not in agreement as to a particular decision.

1.2 Which? considers that in most cases it will be beneficial to individuals seeking to enforce their rights that UK courts should consider how these have been interpreted in the ECtHR, not least because of the ECtHR’s long history and experience of deciding human rights matters. For example, the ECtHR case law in relation to Article 6 provides extremely helpful guidance on whether or not an individual’s issue is in fact a genuine and serious dispute for the purposes of that Article (see *Fayed v the UK*). Indeed, UK judges have also described how the duty has been helpful in guiding and assisting their assessment as to whether a public authority has acted in a manner inconsistent with fundamental rights, and how it has been a useful method of ensuring consistency with regards to interpretation across member states. It is also our view that the current approach provided for by the HRA allows sufficient leeway for courts where the specific circumstances in the UK require a different outcome. Which? considers that this is already provided for by the way in which the duty in Section 2 of the Act has been drafted, therefore does not agree any changes are required.

**2. (b) - When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?**

2.1 The ECtHR recognises that individual states have cultural and political differences and provides for these differences by allowing a ‘margin of appreciation’ with regards to these usually, highly sensitive issues (for example, abortion and assisted suicide cases). The current approach ensures there is respect for state sovereignty, while still ensuring compliance with the Convention.

2.2 In many matters particularly affecting individuals as consumers (for example, the right to peaceful enjoyment of possessions, under Article 1 Protocol 1), it is acknowledged that the ‘margin of appreciation’ granted to States under ECtHR jurisprudence is already very broad. For issues of high-level economic policy and allocation of public resources this is very much the case. However, Which? believes that, especially in the light of the pandemic where ‘margin of appreciation’ arguments are likely to arise that may negatively impact consumers (such as on consumer credit or taxation concessions), it is all the more important that the current safeguards in the HRA legislative framework are not diluted.

**3. (c) - Does the current approach to ‘judicial dialogue’ between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?**

3.1 In our view, yes, the current approach does permit UK judges to raise concerns with the ECtHR, and we consider that this is an important mechanism through which judges from the respective courts can interact and address issues (via their judgments) when dealing with certain, often similar, circumstances. It could perhaps be strengthened and preserved by increasing informal bilateral and



multilateral engagement with legal experts and judicial representatives in countries that are party to the Convention and that have a similar approach, such as Germany.

- 3.2 In Which?'s view, amending the HRA specifically to attempt to address perceived 'judicial dialogue' issues would create a risk of more uncertainty and inconsistency of application for potential parties to cases, lawyers and judges. This is clearly not a desirable alternative for the UK courts, Parliament and the Executive, or for individuals' seeking to protect their rights.

#### Theme two

**The impact of the HRA on the relationship between the judiciary, the executive and the legislature,** namely, whether the current approach "strikes the right balance" between the courts, the government and parliament, or whether there is "over-judicialising", drawing UK courts unduly into questions of policy.

**4. (a) - Should any change be made to the framework established by Sections 3 and 4 of the HRA? In particular:**

***i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by Section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should Section 3 be amended (or repealed)?***

- 4.1 Which? do not consider this to be an issue that needs to be resolved, particularly as the Government has expressed that it maintains its commitment to upholding Convention rights, and the UK courts are required to interpret legislation in a way that is compatible with that commitment. In the consumer context, we certainly do not think that this has resulted in legislative intention being undermined, for example in relation to the interaction between Article 8 privacy rights and data protection legislation. And in arguably the most high profile 'consumer' case in this field (*Wilson v First County Trust Ltd*), the House of Lords found that the Consumer Credit Act 1974 was compatible with the Convention.

- 4.2 We do not therefore agree that the above requirement has led to legislation being interpreted in a way that is inconsistent with the intentions of Parliament.

***ii. If Section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous Section 3 interpretations adopted by the courts?***

- 4.3 Which? does not agree that Section 3 of the HRA should be amended or repealed for the reasons set out above.

***iii. Should declarations of incompatibility (under Section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?***



4.4 In our view, it is already the role of Parliament to consider how an incompatibility should be addressed, by virtue of the way in which the HRA has been drafted so as to preserve parliamentary sovereignty. As mentioned above, Parliament is not required to make any amendment to legislation in the face of a declaration of incompatibility or a remedial order, therefore, it is always Parliament's decision as to what, if anything, to do about an incompatibility that is pointed out by the UK courts.

**5. (b) - What remedies should be available to domestic courts when considering challenges to designated derogation orders made under Section 14(1)?**

5.1 Which? does not have any specific comments to make in relation to this question.

**6. (c) - Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?**

6.1 In our view, there have not been any problems with this issue from the perspective of consumers, or individuals generally. It also seems to us that given the recent concerns around increasing use of so called 'Henry VIII' powers in putting forward secondary legislation, it is particularly important that the current safeguards in the HRA remain in this respect.

**7. (d) - In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?**

7.1 Which? does not have any specific comments to make in relation to this question, other than to point out that, from the perspective of a consumer rights organisation, we are frequently having to consider questions of jurisdiction and territoriality on consumer rights enforcement and foreign courts, especially on travel, financial services and digital rights.

**8. (e) - Should the remedial order process, as set out in Section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?**

8.1 As mention in answer 4.4 above, we already consider the role of Parliament by virtue of the current framework to be supreme. As mentioned, it is Parliament's decision as to whether to make amends to an Act of Parliament that is held to be incompatible where flagged by a Section 4 declaration or by way of a remedial order, but it is not *required* to do so. We do not therefore agree that the current approach needs to be 'enhanced' through any reform or amendment.

## **Conclusion**

In conclusion, it is Which?'s view that the current operation of the HRA works effectively for individuals' seeking to enforce potential violations of their fundamental rights.

Which? welcomes the opportunity to engage further with the IHRAR and would be more than happy to assist the IHRAR's consultation by way of providing further views and evidence as necessary.



Yours sincerely,

A stylized, handwritten signature in black ink, appearing to read "Rocio Concha".

**Rocio Concha**  
**Director of Policy and Advocacy**  
**Which?**

A handwritten signature in black ink, appearing to read "Charmian Averty".

**Charmian Averty**  
**General Counsel**  
**Which?**